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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of **IMPLEMENTATION OF THE NON-ACCOUNTING SAFEGUARDS OF SECTIONS 271 AND 272 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED**	)	**CC Docket No. 96-149**

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association ("TRA"), an organization consisting of more than 500 entities engaged in, or providing products or services in support of, telecommunications resale, adamently opposes any further diminution of the already relatively-relaxed non-accounting separate affiliate and nondiscrimination safeguards adopted in the First Report and Order and generally supports proposals to strengthen these essential protections. Consistent with this position, TRA recommends that the Commission:

- retain the prohibition on the performance of operating, installation or maintenance functions by a BOC or a BOC affiliate for a Section 272 affiliate or by a Section 272 affiliate for a BOC or a BOC affiliate.

- continue to limit the scope of the Section 272(g)(3) exception to activities directly involved in the marketing and sales of service, and to refrain from expanding the exception to include activities only tangentially related to marketing and sales.

- preserve the requirement that BOCs provide out-of-region interLATA information services through separate affiliates.

- strengthen, consistent with the recommendations of MCI, AT&T and Teleport, the non-accounting separate affiliate and nondiscrimination requirements adopted pusuant to Section 272 to govern provision by the BOCs of interLATA telecommunications and information services to ensure true independence of operation.

- adopt, consistent with the recommendations of MCI, such reporting requirements as are necessary to detect and protect violations of Sections 272(c)(1), 272(e)(2) and 272(e)(4).

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COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), hereby responds to petitions for reconsideration[1] of the First Report and Order, FCC 96-489, released by the Commission in the captioned docket on December 24, 1996 (the "First Report and Order").[2] In the First Report and Order, the Commission, pursuant to Section 272 of the Communications Act of 1934,[3] as amended by the Telecommunications Act of 1996,[4] adopted

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[1] Petitions for Reconsideration have been filed by the Association for Local Telecommunications Services ("ALTS"), AT&T Corp. ("AT&T"), BellSouth Corporation ("BellSouth"), Cox Communications, Inc. ("Cox"), MCI Telecommunications Corporation ("MCI"), Teleport Communications Group Inc. ("Teleport"), Time Warner Cable ("Time Warner") and U S West, Inc. ("U S West").

[2] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), CC Docket No. 96-149, FCC 96-489 (Dec. 24, 1996).

[3] 47 U.S.C. § 272.

[4] Pub. L. No. 104-104, 110 Stat. 56, § 151 (1996).

non-accounting separate affiliate and nondiscrimination safeguards to govern provision by the Bell Operating Companies ("BOCs") of such competitive services as interLATA telecommunications and information services.

In its Comments in this proceeding, TRA endorsed the broad reading the Commission accorded both the scope of its authority under Section 272 and to the applicability of the Section 272 safeguards in the Notice of Proposed Rulemaking ("NPRM").[5] TRA, however, urged the Commission to define more aggressively than it had proposed to do in the NPRM the structural and transaction requirements embodied in Section 272(b) and the safeguards against discriminatory conduct set forth in Sections 272(c)(1) and (e). And TRA recommended that the Commission designate as a high priority the creation of mechanisms by which to detect and adjudicate violations of these critical safeguards. Finally, TRA strongly urged the Commission to refrain from relaxing dominant carrier regulation of the provision by BOC Section 272 affiliates of in-region, interstate, domestic, interLATA, as well as in-region international, telecommunications services, until such time as the BOC local exchange/exchange access "bottlenecks" have been dismantled.

Reconsideration of the First Report and Order is sought by two BOCs -- *i.e.,* BellSouth and U S WEST -- and a number of interexchange carriers ("IXCs") -- *i.e.,* AT&T and MCI -- and new local market entrants -- *i.e.,* Teleport, ALTS, Cox and Time Warner. The two BOC commenters seek to further weaken the already relatively relaxed non-accounting separate affiliate and nondiscrimination safeguards adopted in the First Report and Order; the IXC and

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[5] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (Notice of Proposed Rulemaking), CC Docket No. 96-149, FCC 96-308 (July 18, 1996).

new local market entrant commenters seek to strengthen these essential safeguards. TRA adamantly opposes any relaxation of the existing non-accounting safeguards, and, consistent with its earlier-filed Comments, generally supports strengthening these requirements.

I.

COMMENTS OPPOSING RECONSIDERATION

A. The Commission Properly Barred BOCs and Their Section 272 and Other Affiliates from Providing Maintenance and Installation Services for the Local Telephone Company and the InterLATA Provider

In the First Report and Order, the Commission read Section 272(b)(1) to "bar a section 272 affiliate from contracting with a BOC or another entity affiliated with the BOC to obtain operating, installation, and maintenance functions associated with the section 272 affiliate's facilities."[6] "Consistent with this approach," the Commission further "interpret[ed] the term 'operate independently' to bar a BOC from contracting with a section 272 affiliate to obtain operating, installation, or maintenance functions associated with the BOC's facilities."[7] BellSouth complains that "this restriction is contrary to the statute, is inefficient and unnecessary, and should be modified, at a minimum, to permit a BOC *affiliate* (other than the Section 272 affiliate) to perform installation and maintenance functions for both the telephone company and the long distance (interLATA) company."[8] TRA disagrees.

BellSouth's contention that the Commission's determinations are "contrary to the statute" is predicated on the carrier's view that "the structural separation requirements of Section

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6 First Report and Order, FCC 96-489 at ¶ 163.

7 Id.

8 BellSouth Petition at 2.

272(b) are complete unto themselves" and that the Commission thus "did not have the discretion, in 'implementing' Section 272, to add to the detailed statutory scheme established by Congress."[9] This argument assumes, however, that the requirement that the Section 272 affiliate "operate independently" from the BOC requires no further explanation. As the record in this proceeding demonstrates, "operate independently" can be interpreted in very different ways. As capsulized by the Commission:

> With the exception of NYNEX, the BOCs and USTA interpret the term "operate independently" to impose a straight-forward, descriptive requirement that needs no further clarification through the rulemaking process. . . . The majority of commenters, other than the BOCs, urge us to construe the "operate independently" requirement as imposing additional structural separation requirements.[10]

Certainly, there was no consensus among the commenters as to the purportedly "plain meaning" of "operate independently."

BellSouth asserts, however, that if Congress had intended to impose restrictions in addition to those found in Sections 272(b)(2) - (5), it would have done so.[11] Congress did impose an additional restriction -- *i.e.,* the requirement that the BOC "operate independently" of its Section 272 affiliate. It is a well-settled tenant of statutory construction that all words and provisions in statutes should be given meaning and effect; statutes should not be construed in such a way as to render words or provisions superfluous or insignificant.[12] The Commission has

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[9] Id.

[10] First Report and Order, FCC 96-489 at ¶¶ 153 - 154 (footnotes omitted).

[11] BellSouth Petition at 4 - 5.

[12] *See, e.g.,* Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976); Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), *cert denied* 411 U.S. 917 (1974).

given Section 272(b)(1) meaning and effect, interpreting it in accordance with the ends that Section 272 is intended to achieve. As explained by the Commission:

> The requirements that we adopt to implement section 272(b)(1) are intended to prevent a BOC from integrating its local exchange and exchange access operations with its section 272 affiliate's activities to such an extent that the affiliate could not reasonably be found to be operating independently, as required by the statute.[13]

It is no less axiomatic that statutory provisions must be construed in light of the statutory purpose.[14]

Finally, the force of the rationale underlying the Commission's reading of Section 272(b)(1) overwhelms BellSouth's remaining contentions that the Commission's approach "would result in a loss of efficiency and economies of scope" and that the prohibition should not be extended to all BOC affiliates.[15] The Commission reasonably found that "allowing the same personnel to perform the operating, installation, and maintenance services associated with a BOC's network and the facilities that a section 272 affiliate owns or leases from a provider other than the BOC would create the opportunity for such substantial integration of operating functions as to preclude independent operation, in violation of section 272(b)(1)."[16] As explained by the Commission, if the same individuals performed these "core functions" on the BOC's and its

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[13] First Report and Order, FCC 96-489 at ¶ 158.

[14] *See, e.g.,* Kokoszka v. Belford, 417 U.S. 642 (1974); U.S. v. Article of Drug . . . Bacto-Unidisk . . ., 394 U.S. 784, 89 S. Ct. 1410 (1969); U.S. v. State of Maryland for Use of Meyer, 349 F.2d 693 (D.C. Cir 1969).

[15] BellSouth Petition at 5 - 7.

[16] First Report and Order, FCC 96-489 at ¶ 163.

Section 272 affiliate, opportunities for "improper cost allocation, in terms of both the personnel time spent in performing such functions and the equipment utilized" would abound.[17]

Whatever efficiencies or economies of scope might be lost as a result of the operational independence mandated by the Commission, in TRA's view, are substantially outweighed by the benefits derived from safeguarding competitors from anticompetitive discrimination and cost-shifting. In implementing Section 272, the Commission was cognizant of the sensitivity of Congress "to the value to the BOCs of potential efficiencies stemming from economies of scale" and recognized that its "task [was] to implement section 272 in a manner that ensures that the fundamental goal of the 1996 Act is attained -- to open all telecommunications markets to robust competition -- but at the same time does not impose requirements on the BOCs that unfairly handicap them in their ability to compete."[18] Accordingly, the Commission adopted rules and policies that "seek to preserve the carefully crafted statutory balance to the extent possible . . ." BellSouth's complaints notwithstanding, the Commission's implementation of Section 272(b)(1) achieves this objective.

B. The Commission Properly Concluded that the Scope of Section 272(g)(3) is Limited to Actual Marketing and Sales Activities

BellSouth also complains that the Commission has imposed an unduly narrow reading on Section 272(g)(3), arguing that "product development and strategy," as well as "the

[17] Id.

[18] Id. at ¶ 13.

actual sale of the product" should be exempt under Section 272(g)(3) from the nondiscrimination provisions of Section 272(c)(1).[19] Once again, BellSouth is wrong.

Section 272(g)(3) is a narrow provision which sanctions joint marketing activities by BOCs and their Section 272 affiliates, and exempts such joint marketing from Section 272(c)(1)'s nondiscrimination requirements. While the Commission has concluded that "activities such as customer inquiries, sales functions, and ordering appear to involve . . . the marketing and sale of a section 272 affiliate's services," the scope of marketing and sales is obviously not unlimited.[20] As the Commission has properly concluded, activities associated with the "planning, design, and development of a section 272 affiliate's offerings" are "beyond the scope of section 272(g)."[21]

Activities such as "product development and strategy" may ultimately determine the success or failure of a marketing effort, but they are not part of that undertaking. Strategic planning may facilitate marketing success, but as a function, it is independent, and not part, of the sales activity. Section 272(g)(3) exempts "marketing and sale of services" from Section 272(c)(1)'s nondiscrimination requirements; it does not exempt all activities which may impact upon marketing and sales activities. Good products, excellent customer service, network reliability and the like all facilitate successful marketing and sales, but none are exempt from Section 272(c)(1)'s non-discrimination requirements because such an approach would have the exception subsume the rule.

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19 BellSouth Petition at 7 - 10.

20 First Report and Order, FCC 96-489 at ¶ 296.

21 Id.

C. The Commission Properly Required BOCs to Provide Out-of-Region InterLATA Information Services Through a Separate Affiliate

BellSouth further joins U S WEST in objecting to the Commission's requirement that the BOCs provide "out-of-region" interLATA information services through a separate affiliate.[22] BellSouth contends that "the statute clearly exempts out-of-region interLATA information services from the separate affiliate requirement under Section 272(a)(2)(B)(ii), while it subjects other such services to the requirement when provided in-region under Section 272(a)(2)(C)."[23] The carrier reaches this conclusion by shoe-horning "interLATA information services" into the Section 271(b)(2) out-of-region services referenced in Section 272(a)(2)(B)(ii) and arguing that "interLATA information services," like other out-of-region interLATA services, are "exempt from the separate affiliate requirement, pursuant to Sections 271(b)(2) and 272(a)(2)(B)(ii)."[24] Again, BellSouth misses the mark.

Section 272(a)(2)(B) contains an express exemption from the statute's separate affiliate requirement for "interLATA telecommunications services" originated out-of-region. In contrast, Section 272(a)(2)(C) specifically lists "interLATA information services" among the "services for which a separate affiliate is required." The Commission thus reasoned that "the explicit exclusion of out-or-region interLATA telecommunications services in one section of the statute, and the absence of such an express exclusion of out-of-region interLATA information services in another subsection of the same provision, suggests that Congress intended not to

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[22] U S WEST Petition at 2 - 7; BellSouth Petition at 10 - 13.

[23] BellSouth Petition at 11.

[24] Id. at 13.

exclude the latter from the separate affiliate requirement."[25] Even U S WEST begrudgingly acknowledges that this is "a plausible reading of the statute."[26]

TRA submits that the Commission's interpretation is not merely a plausible reading, it is the better, and perhaps the only legitimate, reading of Section 272(a)(2). Congress not only expressly exempted out-of-region interLATA telecommunications services from the separate affiliate requirement, but it specifically declined to include out-of-region interLATA information services among the exemptions to the separate affiliate requirement listed in Section 272(a)(2)(C). This "one-two punch" renders BellSouth's and U S WEST's argument rather tenuous.

II.

COMMENTS IN SUPPORT OF RECONSIDERATION

A. The Commission Should Strengthen the Non-accounting Separate Affiliate and Nondiscrimination Requirements Imposed on BOC Provision of Competitive Services in Accordance with the Recommendations of MCI and AT&T

TRA concurs with the recommendations proffered by MCI and AT&T for strengthening the non-accounting separate affiliate and nondiscrimination safeguards adopted in the First Report and Order to govern BOC provision of such competitive services as interLATA telecommunications and information services.[27] As the Commission recognized, "the local

[25] First Report and Order, FCC 96-489 at ¶ 86.

[26] U S WEST Petition at 3.

[27] MCI Petition at 3 - 10; AT&T Petition at 3 - 10.

exchange market will not be fully competitive immediately upon its opening."[28] Noting that the "BOCs currently are the dominant providers of local exchange and exchange access services in their in-region states, accounting for approximately 99.1 percent of the local service revenues in those markets," the Commission acknowledged that "BOC entry into in-region interLATA services raises issues for competition and consumers, even after a BOC has satisfied the requirements of section 271(d)(3)."[29]

It is for this reason that "Congress . . . imposed . . . a series of separate affiliate requirements applicable to the BOCs' provision of certain new services and their engagement in certain new activities . . . [which are] designed, in the absence of full competition in the local exchange marketplace, to prohibit anticompetitive discrimination and cost-shifting, while still giving consumers the benefit of competition."[30] These statutory safeguards will achieve these ends only if fully implemented by the Commission. As the Commission has made clear, a BOC "ha[s] the incentive to allocate improperly to its regulated core business costs that would be properly attributable to its competitive ventures . . . to discriminate in providing exchange access services and facilities that its affiliate's rivals need to compete in the interLATA telecommunications services and information services markets . . . [and to] charge[] other firms prices for inputs that are higher than the prices charged, or effectively charged, to the BOC's section 272 affiliate . . . , creat[ing] a 'price squeeze'."[31]

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[28] First Report and Order, FCC 96-489 at ¶ 9.

[29] Id. at ¶ 10.

[30] Id. at ¶ 9.

[31] Id. at ¶¶ 10 - 12.

It is thus imperative for the Commission, as TRA suggested in its Comments, to "look beyond the specific requirements listed in Section 272(b) to ensure meaningful independence of operation."[32] Thus, TRA urged the Commission to prohibit, "until such time as meaningful competition has emerged in the local telecommunications market . . . , joint marketing, common ownership of equipment and facilities, sharing of personnel, joint research and development, and sharing of information."[33] The Commission declined to adopt these recommendations, opting only to require maintenance of separate books of account, to prohibit joint ownership of transmission and switching facilities, and to require acquisition of local exchange and exchange access services at tariffed rates and conditions.[34]

MCI and AT&T have identified a number of particularly consequential weaknesses in the Commission's non-accounting separate affiliate and nondiscrimination safeguards. In particular, MCI, joined by Teleport,[35] emphasizes the dangers inherent in allowing BOCs' Section 272 affiliates to provide local exchange/exchange access services, stressing in so doing the resultant integration of operations and the ready avoidance of competitive safeguards. And both MCI and AT&T highlight the broad integration of functions such as "marketing, sales, advertising, service design and development, product management, facilities planning, and other activities" permissible under the rules promulgated by the First Report and Order.[36]

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32 TRA Comments at 13.

33 Id.

34 First Report and Order, FCC 96-489 at ¶¶ 151, 156.

35 MCI Petition at 3 - 10; Teleport Petition at 1 - 9.

36 AT&T Petition at 3.

TRA agrees with these commenters that the relaxed non-accounting safeguards adopted in the First Report and Order are inconsistent with the mandate of Section 272(b)(1) that BOCs and their Section 271 affiliates "operate independently." TRA also endorses the view that the structural separation requirements promulgated by the Commission are inadequate to safeguard against BOC anticompetitive discrimination and cost-shifting. And TRA supports the position that the Commission has failed to justify its dramatic departure from precedent in defining the parameters of independent operation here. In short, TRA agrees with MCI that:

> the intertwining of the activities of a BOC and its separate affiliate allowed by the Order will prevent the accomplishment of the stated goal of this proceeding, which was to implement Section 272 such that the BOCs cannot use their continuing local exchange monopoly power to discriminate against interexchange competitors and cross-subsidize their interLATA and other competitive services with local and access revenues.[37]

B. The Commission Should Strengthen the Reporting Requirements to Facilitate Detection of Anticompetitive Discrimination and Cost-Shifting as Advocated by MCI

TRA further agrees with MCI that the First Report and Order's "failure to impose reporting requirements to detect and prevent violations of Sections 272(c)(1), 272(e)(2), and 272(e)(4) should also be corrected."[38] The Commission has recognized that vigilant and vigorous enforcement of statutory and regulatory mandates is vital during "the transition from monopoly to competition;" indeed, failure to meet this responsibility, the Commission has conceded, may render ineffective its efforts and the efforts of Congress to open all telecommunications markets

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[37] MCI Petition at 9 - 10.

[38] Id. at 10.

to competition.[39] As succinctly stated in the NPRM, "[e]nforcement of the statutory separate affiliate and nondiscrimination safeguards established by sections 271 and 272 and the rules we may adopt to implement those provisions will be critical to ensuring the full development of competition in the local and interexchange telecommunications markets."[40]

Reporting requirements are a key enforcement tool. As the Commission has recognized, reporting requirements "act to deter potential anticompetitive behavior by requiring BOCs to provide objective proof of their compliance with the separate affiliate and nondiscrimination requirement . . . [and] enable competitors, as well as the Commission, to detect any potential violations of these requirement."[41] Accordingly, TRA included among the five enforcement mechanisms it recommended both to ensure compliance with the separate affiliate and nondiscrimination safeguards and to facilitate detection of violations, mandatory "regular, periodic reporting of all matters involving interactions between a BOC and its interLATA affiliate," accompanied by the prompt availability of all such reports for public inspection.[42] As TRA explained, "[d]etailed reports, certified to be accurate by officers of the BOCs, will establish the standards pursuant to which competitors can determine whether they are being treated in an equitable manner."[43]

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39 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, ¶ 20 (released August 8, 1996), *pet. for rev. pending sub nom.* Iowa Utilities Board v. FCC, Case No. 96-3321 (8th Cir. Sept. 5, 1996), *recon.* FCC 96-394 (Sept. 27, 1996), *further recon.* FCC 96-476 (Dec. 13, 1996), *further recon. pending* ("Local Competition First Report and Order").

40 NPRM, FCC 96-308 at ¶ 94.

41 First Report and Order, FCC 96-489 at ¶ 321.

42 TRA Comments at 19 - 20.

43 Id.

TRA thus shares MCI's disappointment with the First Report and Order's failure to adopt reporting requirements in conjunction with Sections 272(c)(1), 272(e)(2), and 272(e)(4). TRA agrees with MCI that the Commission's suggestion that such reporting requirements are unnecessary is simply wrong. Contrary to the Commission's belief, reporting requirements are essential to the effectiveness of the Section 271 review process and the Commission's formal complaints process. The data generated by such reporting requirements will enable complainants to present the *prima facia* cases necessary to support complaints and will permit the Commission, the Department of Justice and interested parties to conduct meaningful analyses of BOC Section 271 applications for in-region authority. The biennial joint federal/state audits conducted pursuant to Section 272(d) may ultimately produce comparable data, but the lag in time will be devastating to competitors which have been and are being subjected to anticompetitive abuses. And individual interconnection agreements may or may not provide for performance and service quality standards and reporting, and if they do, such data will likely not reveal discrimination between a BOC's treatment of its Section 272 affiliate and other providers.

TRA, accordingly, agrees with MCI that the First Report and Order should be modified "to impose reporting requirements to facilitate the enforcement of Section 272(c)(1) and Section 272(e)."[44] Moreover, TRA joins with MCI in recommending that "[t]he BOCs should be required to report, at a minimum, the failure frequency of local and exchange access circuits, local and exchange access service repeat troubles as a percentage of trouble reports, and the percentage of exchange access circuit failures within 30 days of installation."[45]

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[44] MCI Petition at 14.

[45] Id.

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to reconsider its First Report and Order consistent with these comments.

Respectfully submitted,

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